84-836 (1)

FILED
NOV 21 1984

No. 84-

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

JOHN K. VAN DE KAMP
Attorney General of
the State of California

WILLIAM GEORGE PRAHL
Deputy Attorney General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5262

Attorneys for Petitioner

58 pp

QUESTIONS PRESENTED

1. Was it error for the District Court to apply a rule of Per Se reversible error to a case of discriminatory grand jury selection where there is overwhelming evidence of the defendant's guilt and where the defendant received a full and fair trial?

2. Did respondent fail to exhaust his available state remedies by significantly changing the evidentiary basis of his claim for relief without ever presenting this new evidence to the state courts?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
STATEMENT OF PERTINENT FACTS	8
A. Facts of the Offense	8
B. Facts Produced at Respondent's Original State Court Motion to Quash the Indictment	10
C. Facts Produced at the Federal Evidentiary Hearing	16
ARGUMENTS	
I IT WAS ERROR FOR THE DISTRICT COURT TO APPLY A PER SE REVERSIBLE ERROR RULE TO A CASE OF PURPOSEFUL DISCRIMINATION WHERE THERE IS OVERWHELMING EVIDENCE OF DEFENDANT'S GUILT AND WHERE THE DEFENDANT RECEIVED A FULL AND FAIR TRIAL	20

	Page
II RESPONDENT FAILED TO EXHAUST HIS AVAILABLE STATE REMEDIES SINCE HE SIGNIFICANTLY CHANGED THE EVIDENTIARY BASIS OF HIS CLAIM FOR RELIEF WITHOUT EVER PRESENTING THIS NEW EVIDENCE TO STATE COURTS	33
CONCLUSION	41

TABLE OF AUTHORITIES

	Pages
Cassell v. Texas (1950) 339 U.S. 282	28
Castaneda v. Partida (1976) 430 U.S. 482	23, 24
Chapman v. California (1967) 386 U.S. 18	20, 22
Connecticut v. Johnson (1983) ___ U.S. ___	20
Daniels v. Nelson (9th Cir. 1972) 453 F.2d 340	37
Gideon v. Wainwright (1963) 372 U.S. 335	21
Gurule v. Turner (10th Cir. 1972) 461 F.2d 1083	35, 40
Hillery v. Pulley (E.D. Cal. 1982) 533 F.Supp. 1189	7
Hillery v. Pulley (E.D. Cal. 1983) 563 F.Supp. 1228	8
Hillery v. Sumner (E.D. Cal. 1980) 496 F.Supp. 632	7
Hobby v. United States (1984) ___ U.S. ___	28, 29
In re Hillery (1969) 71 Cal.2d 857	5

	Pages
Knoxson v. Estelle (5th Cir. 1978) 574 F.2d 1339	35
Paullett v. Howard (3rd Cir. 1980) 634 F.2d 117	37
Payne v. Arkansas (1958) 356 U.S. 560	21
People v. Anderson (1972) 6 Cal.3d 628	9
People v. Hillery (1965) 62 Cal.2d 692	5, 9, 13
People v. Hillery (1967) 62 Cal.2d 795	5
People v. Hillery (1974) 10 Cal.3d 897	5, 10
Rose v. Mitchell (1979) 443 U.S. 545	24, 25, 26, 27
Schiers v. People of the State of California (9th Cir. 1964) 333 F.2d 173	38
Stone v. Powell (1976) 428 U.S. 465	23, 24
Sumner v. Mata (1981) 449 U.S. 539	11
Tumey v. Ohio (1927) 273 U.S. 510	21
United States ex rel. Barksdale v. Blackburn (5th Cir. 1981) 635 F.2d 1115	8, 25, 26, 28

	Pages
Zicarelli v. Dietz (3rd Cir. 1980) 633 F.2d 312	34, 35
Zicarelli v. Gray (3rd Cir. 1976) 543 F.2d 466	34

STATUTES, CODES AND OTHER AUTHORITIES

California Code of Civil Procedure	
§ 198	14
§ 200	15
§ 206	13
California Penal Code	
§ 187	3
§ 893	14, 15
§ 897	15
§ 899	13
§ 995	10
§ 1239(b)	5
28 United States Code	
§ 1257(e)	2
§ 2254	33, 40
United States Constitution	
Amendment Five	3
Amendment Fourteen	3
20 U.C.L.A. Law Review 581 (1973)	16
Friendly, Is Innocence Irrelevant? Collateral Attach on Criminal Judgments, 38 U.Chi.L.Rev. 142	8

No. [illegible]-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The unreported majority and dissenting opinions of the Ninth Circuit Court of Appeal affirming an order of the United States District Court for the Eastern District of California were filed on May 14,

1984. These opinions are reproduced as Appendix "A." A timely petition for rehearing and a suggestion for rehearing en banc was thereafter field in the Ninth Circuit Court of Appeal. That court filed an order denying rehearing on September 12, 1984. The opinion is reproduced as Appendix "B."

JURISDICTION

Petitioner asserts jurisdiction under 28 United States Code section 1257(e).

- - - - - -

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

The Grand Jury of Kings County returned an indictment on June 27, 1962, charging respondent Booker T. Hillery with a violation of California Penal Code section 187 in that on or about the 21st of March, 1962, respondent did willfully, unlawfully,

and feloniously murder Marlene Miller (CT 1). [1]

On July 16, 1962, respondent, through his attorney, made a motion to quash the indictment. The motion alleged that members of respondent's race had been systematically and purposely excluded from the Grand Jury which indicted him (RT 26, 28).

Respondent's motion was heard, considered, and denied on July 31, 1962 (CT 41).

On November 16, 1962, the jury returned a verdict of guilty as to the charged offense and fixed the degree at first degree murder (CT 75). On November 20, 1962,

1. Hereafter "CT" refers to the Clerk's Transcript prepared in connection with the appeal of respondent's first state court trial; "RT" refers to the Reporter's Transcript prepared in connection with the appeal of respondent's first state court trial; "CR" refers to the Clerk's Record for the Ninth Circuit appeal in this case.

the jury returned a verdict fixing respondent's penalty at death (CT 132).

On November 26, 1962, the court imposed a judgment of death (CT 145).

An automatic appeal to the California Supreme Court followed pursuant to section 1239(b) of the Penal Code.

On May 3, 1965, the California Supreme Court filed an opinion affirming the guilt phase of respondent's trial but reversed imposition of the death penalty. (People v. Hillery (1965) 62 Cal.2d 692.)

Respondent was to be subsequently given to additional penalty trials with each resulting in imposition of a death sentence. (See People v. Hillery (1967) 62 Cal.2d 795, cert. en., 87 S.Ct. 958 (1967); In re Hillery (1969) 71 Cal.2d 857; People v. Hillery (1974) 10 Cal.3d 897.)

In January of 1978, respondent filed a habeas corpus petition in the Marin

County Superior Court alleging that blacks had been excluded from the grand jury which indicted him (CR 1). Respondent relied upon the record of his original motion to quash to support his claim of purposeful discrimination.

In March of 1978, respondent filed a petition for writ of habeas corpus in the First District Court of Appeal and in April of 1978 respondent filed a petition for a writ of habeas corpus in the California Supreme Court (CR 1). On each occasion, respondent did not offer any new evidence and instead relied on the record of his original trial.

The instant petition was originally filed in the United States District Court for the Northern District of California on May 22, 1978 and was later transferred to the Eastern District. In the original petition, respondent again relied upon the state court

record and did not seek an evidentiary hearing in federal court.

On August 7, 1980, the District Court issued a published order denying petitioner's various dispositive motions (CR 21). (Hillery v. Sumner (E.D. Cal. 1980) 496 F.Supp. 632.)

On November 10, 1981, petitioner field a notice of motions and motions for dismissal of petition for failure to exhaust as to the newly discovered and recently produced evidence and for summary denial of the petition (CR 36).

On March 9, 1982, the District Court filed a published opinion denying the state's motion. The court held, inter alia, that respondent's allegations were sufficient to support a prima facie case and to preclude the summary dismissal of the petition (CR 39). (Hillery v. Pulley (E.D. Cal. 1982) 533 F.Supp. 1189.)

On May 12, 1983, the District Court issued its published 54-page opinion granting the petition for a writ of habeas corpus (CR 56). (Hillery v. Pulley (E.D. Cal. 1983) 563 F.Supp. 1228.)

STATEMENT OF PERTINENT FACTS

A. Facts of the Offense

While the facts of the offense may not initially seem relevant to respondent's contention regarding the selection of the 1962 King County Grand Jury, there is case law and commentary which suggests that a habeas corpus petitioner's guilt may not be a totally irrelevant consideration. 2/

A detailed factual account of the offense may be found in the 1965 opinion of the California Supreme Court in People v.

---

1. See Friendly, Is Innocence Irrelevant? Collateral Attach on Criminal Judgments, 38 U.Chi.L.Rev. 142, 170; United States ex rel. Barksdale v. Blackburn (5th Cir. en banc, 1981) 635 F.2d 1115.)

Hillery, supra, 62 Cal.2d 692 which affirmed the guilt phase of respondent's state court conviction but which reversed his death penalty sentence.

The guilt phase of respondent's trial was not reviewed again on direct appeal but two subsequent death penalty judgments were overturned and respondent's third death sentence was finally commuted to life imprisonment by virtue of the California Supreme Court's decision in People v. Anderson (1972) 6 Cal.3d 628.

A review of these facts makes it virtually impossible to entertain any doubt whatever that respondent brutally murdered fifteen-year-old Marlene Miller while he was on parole from an earlier forcible rape conviction. Three separate juries have arrived at this conclusion, including one in Kern County where the matter was tried

because of a change of venue. (See People v. Hillery, supra, 10 Cal.3d 897.)

B. Facts Produced at Respondent's Original State Court Motion to Quash the Indictment

Respondent raised the issue of systematic exclusion of black persons from the grand jury which had indicted him in a pretrial motion to set aside the indictment pursuant to California Penal Code section 995 which was dated July 16, 1962 (CT 11, 23, 26; RT 15). Supporting and opposing affidavits were filed and an evidentiary hearing and arguments were held on July 16 and 31, 1962 (CT 28-41; RT 6, 15). All of the material from the state court record which relates to respondent's motion to quash was provided to the District Court in connection with the petition for federal habeas corpus relief.

In his direct appeal from the judgment of conviction, respondent challenged the trial court's ruling on his motion to

quash. In affirming this conviction, the California Supreme Court made a series of factual findings which petitioner now contends are binding on the federal courts pursuant to Sumner v. Mata (1981) 449 U.S. 539.

The California Supreme Court specifically found that:

> "Defendant [respondent] sought to prove that no Negro had served on a Kings County grand jury since 1893, the year in which the county was organized. The People did not dispute this fact, but introduced evidence based on official census records establishing that in 1960 Negroes constituted only 5.1 percent of the total population of Kings County, and that prior to World War II the proportion had been 1 percent or less. It was also shown that Negroes had often served on petit juries in Kings County (and defendant does not complain of the fact that there was no Negro on the jury that tried and convicted him). The county clerk testified that it was her duty to check the proposed grand jury list against the voters' registration affidavits to determine whether any persons therein named were disqualified by statute, but that

such affidavits bear no indication as to the race of the voter; she further testified that during her tenure in office (since 1953) no member of the board of supervisors or judge of the superior court had ever requested her to determine the race of a prospective grand juror.

"In the court of the hearing on the motion to quash, the trial judge spoke at length on the subject of his method of selecting grand juries since he took office in 1956, and subsequently ordered that such statements be considered as his testimony. He said that in selecting a panel he 'always endeavors on each one of those [judicial] districts to get a good cross section of people who will be qualified to serve as Grand Jurors'; that he had consistently 'tried to get a distribution of racial descents, tried to get both sexes represented, tried to get occupations, farmer [sic], business men and various other types so it will be real -- a real representative group of people, of the better type'; and that since 1956 he had not had a Negro on the panel 'not through lack of desire, but purely through lack of ability to find one that the Court feels would make a proper Grand Juror.' The judge pointed out that he had previously asked defendant's counsel to suggest the names of Negro residents who might be qualified to serve, and had

considered selecting a Mr. Lloyd Welcher but declined to after determining that the duties would interfere with the latter's regular employment. Finally, it was shown that in Kings County 'rarely is any of the grant jury's time devoted to hearing evidence of criminal offenses,' and that in the decade evidence of criminal offenses,' and that in the decade ending in 1962 more than 1,000 prosecutions were initiated by information while four were initiated by indictment and only one of the later was against a Negro." (People v. Hillery, supra, 62 Cal.2d at pp. 709-710.)

Kings County was formed in 1893 and had only one superior court judge. Judge Meridith Wingrove took the bench in 1956, and was on the bench in 1962 when respondent was indicted.

From 1900 until 1962 either California Code of Civil Procedure (CCP) section 206, or California Penal Code (Pen. Code) section 899, required that the superior court apportion its grand jury selections according to the population of the county's four judicial districts.

Until 1915 the statutory qualifications for grand jury service included a requirement of property ownership. (CCP § 198.)

Until 1972 it was a requirement for grand jury service that a person be 21 years of age. Until 1920 grand jury service was limited to males.

From 1915 until 1962 it was a requirement that a person be a resident of the state and county for one year before being eligible for grand jury service. (CCP § 198.) There were also disqualifications because of the conviction of a felony and because of a lack of United States citizenship. (Pen. Code, § 893.) To be eligible for grand jury service persons had to have sufficient knowledge of the English language and had to be of ordinary intelligence. (CCP § 198.) Persons serving on the grand jury were to be of fair

character, approved integrity, and had to have sound judgment. (Pen. Code, § 897.) Persons who had served on a grand jury during the previous year and those service on trial juries were also disqualified from grand jury service. (Pen. Code, § 893.)

There were also a number of statutory exemptions from grand and trial jury service which included ministers of the gospel, teachers, mail carriers, military personnel, and certain railroad employees. (CCP § 200.)

Grand jury service in California is for one year with only one grand jury being impaneled in the county each year. The grand jury in California performs both civil and criminal functions. In its role as a "watchdog" of county government, the grand jury investigates the various functions of county government and issues a comprehensive yearly report which details its findings and

often included recommendations for changes. (See 20 U.C.L.A. L.Rev. 581 (1973).)

C. Facts Produced at the Federal Evidentiary Hearing

Over the State's strenuous objections, the District Court conducted an evidentiary hearing on April 28-29 of 1982. To accommodate two elderly witnesses who had hardships, the court allowed the testimony of these witnesses to be taken by deposition.

The evidentiary hearing conducted in this matter reaffirmed the State's earlier assertions that any attempt to try a 20-year-old factual dispute would be virtually impossible.

Three of the witnesses respondent called at the federal evidentiary hearing were older black people who had been long-time residents of Kings County. Each of these witnesses had previously submitted declarations under penalty of perjury

attesting inter alia to the fact that they knew the qualifications for grand jury service and knew there were black persons in Kings County who met these qualifications. However, when they testified in person each said they did not knew the qualifications for grand jury service.

These witnesses testified that black people had served on the county's trial juries. There was also testimony that black people served on trial juries before petitioner's 1962 indictment. Each witness acknowledged that prior to the late 1940's, the Kings County black population was extremely small. Before the second world war, blacks were generally involved in farm work and traveled throughout the county to get jobs. Prior to the late 1940's most of the black people in Kings County lived on farms spread throughout the county. After the postwar influx of blacks into the county,

the urban population of blacks grew, primarily in the county's largest city, Hanford.

One of the attorneys in the firm representing respondent in the federal proceedings testified that he selected certain census data from each decennial census from 1900 through and including 1960 which he felt estimated the population of eligible blacks in Kings County.

For the critical two decades of 1960 and 1950, respondent's counsel had to estimate the population of blacks over 21 years old in Kings County since "a breakdown of black males and black females age 21 and over was not available."

Respondent also presented the testimony of a forensic actuary, Mr. Parkyn, who performed a sophisticated computer analysis of the census data provided to him by respondent's counsel. Mr. Parkyn testified that, based on his computer analysis, there

BEST AVAILABLE COPY

was very little probability that 62 all non-black grand juries could have been selected in Kings County from 1900 until 1962.

Although means were available to do so, Mr. Parkyn did not interpolate each decennial census but instead used a constant figure for each of the ten years within the decade.

Most importantly, Mr. Parkyn testified that his analysis could not prove intent but merely proved probability. Furthermore, Mr. Parkyn testified that only 19 black persons would have served throughout the 62 years between 1900 and 1962 if the selection system had been perfectly random.

Based on this sketchy and newly developed evidence, the District Court reversed a twenty-year-old first degree murder conviction supported by three separate jury verdicts.

- - - - - -

ARGUMENTS

I

IT WAS ERROR FOR THE DISTRICT COURT TO APPLY A PER SE REVERSIBLE ERROR RULE TO A CASE OF PURPOSEFUL DISCRIMINATION WHERE THERE IS OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT AND WHERE THE DEFENDANT RECEIVED A FULL AND FAIR TRIAL

In the recent case of Connecticut v. Johnson (1983) ___ U.S. ___, 103 S.Ct. 969 this Court examined the doctrine of "harmless error" as it applies to state criminal prosecutions. In Johnson this Court cited its earlier opinion in Chapman v. California (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705, with approval. The Johnson court noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" Connecticut v. Johnson, supra, 103 S.Ct. at 975 (emphasis added).

This Court then went on to note the instances where a violation of a criminal defendant's constitutional rights can not be considered to be harmless error. The cases cited included: Gideon v. Wainwright (1963) 372 U.S. 335 (right to counsel at trial); Payne v. Arkansas (1958) 356 U.S. 560 (coerced confession); Tumey v. Ohio (1927) 273 U.S. 510 (impartial judge). Each case dealt with the fairness of the trial which the defendant had received.

Chapman, however, also established the rule that "some constitutional errors may be considered harmless if the beneficiary of the error "proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

The District Court in the instant case adopted and applied a rule of per se reversal for cases involving purposeful

discrimination in the selection of grand juries.

However, the court in Chapman, supra, 386 U.S. at 21 rejected the argument that "all federal constitutional error, regardless of the facts and circumstances, must always be deemed harmful."

The danger of a discriminatorily selected grand jury is that its evaluation of the evidence against a defendant may be biased, resulting in an unfounded charging document being filed against him. There is also a danger of an otherwise unnecessary public trial where, if the bias continues, a defendant may be wrongly convicted. However, where the only contention of impropriety in the entire process resulting in a defendant's conviction relates to the selection of the grand jurors, the indictment is not necessarily erroneous, and most importantly, the validity of the trial is unaffected. As

in Fourth Amendment cases, the retrospective focus on the grand jury selection process distracts attention from the crucial inquiry of whether the petitioner has had a fair and unbiased trial wherein an appropriately constituted trial jury has found him guilty beyond any reasonable doubt. (See Stone v. Powell (1976) 428 U.S. 465, 490.) Moreover, once the state trial and appellate courts have considered and ruled on a petitioner's claim of discriminatory grand jury selection, any potential for unconstitutionality in an individual case has been investigated and negated.

The dissenting opinion in Castaneda v. Partida (1976) 430 U.S. 482, 508, while noting that the issue was not before the court at that time, points out that a "strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after Stone v. Powell. . . ."

Three justices support this statement with reference to the Stone rationale, which they conclude is even more pertinent in grand jury discrimination cases:

> "Unlike the prisoner in Stone, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in Stone, the incremental benefit of extending habeas corpus as a means of correction unconstitutional grand jury selection procedures might be viewed as 'outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.'" (Castaneda v. Partida, supra, p. 508, fn. 1.)

In an apparent response to Justice Powell's dissent in Castaneda, supra, Justice Blackmun wrote in Part II of his opinion in Rose v. Mitchell (1979) 443 U.S. 545 that a claim of racial discrimination in the selection of grand jury foremen presented an

issue cognizable on habeas corpus regardless of the guilt or innocence of the petitioner, and regardless of whether the state had previously granted a full and fair hearing on the petitioner's claim.

At least one federal court has indicated that Part II of the Rose opinion may not have any precedential value since:

> ". . . Part II of Justice Blackmun's opinion was joined by only two justices who joined in the judgment of the Court and by two dissenters (Justices White and Stevens), leading Justice Powell to question its precedential value 'for not all of the four Members who join in support even the Court's judgment.' Rose v. Mitchell, supra, 443 U.S. at 582, n. 3, 99 S.Ct. at 3014, n. 3 (Powell, J., concurring). Since 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds,' Gregg v. Georgia, 428 U.S. 153, 169, n. 15, 96 S.Ct. 2909, 2923, n. 15, 49 L.Ed.2d 859 (1976), Justice Powell's point is well taken." (United States ex rel. Barksdale v. Blackburn, supra, 639 F.2d at 1120.)

In Barksdale, supra, Circuit Judge Ainsworth also held that even if Part II of Rose is part of the holding of the Court, it may still not be dispositive in all jury discrimination cases. (Id.)

When the recent drastic changes in the scope of federal habeas corpus relief are combined with the unique circumstances of the instant case, it becomes clear that respondent is not entitled to a reversal of his conviction simply because the district court found that there may have been some discrimination in the selection of the grand juries in Kings County from 1900 until 1962.

For example, the instant case is distinguishable from Rose since there is affirmative and uncontested evidence that black persons regularly served on trial juries in Kings County before 1962. Furthermore, there is also evidence in this case that blacks served on grand juries

during the 20 years after respondent's indictment.

The charging process in California is also markedly different from that of Tennessee where all criminal prosecutions must begin with an indictment. (Rose v. Mitchell, supra, at p. 548, n. 1.) In California a vast majority of prosecutions are initiated by the complaint process which relies upon a preliminary hearing for a finding of probable cause to conduct a trial. In 1962 the Kings County Grand Jury was even less involved in the charging process than the average California grand jury.

This distinction is important since one of the primary reasons expressed by Justice Blackmun for rejecting application of the harmless error rule to grand jury cases was his understanding of the role played by the indicting grand jury in Tennessee. See

Hobby v. United States, ___ U.S. ___, 104 S.Ct. 3093 (1984).

California's position on the applicability of the harmless error rule to cases of purposeful discrimination in grand jury selection is neither novel nor is it an attempt to ignore the constitution. For example, Mr. Justice Jackson first endorsed this argument more than thirty-five years ago in his dissent in Cassell v. Texas (1950) 339 U.S. 282, 298. More recently, Justices Stewart and Rehnquist agreed with this argument in their dissent in the case of Rose v. Mitchell, supra, 443 U.S. 545, 574. In United States ex rel. Barksdale v. Blackburn, supra, 639 F.2d 1115, the Fifth Circuit recognized the distinct possibility that unless grand jury discrimination is accompanied by petit jury discrimination "such grand jury discrimination might be harmless error." Finally, in the recent case

of Hobby v. United States, supra, this Court held that discrimination in the selection of federal grand jury foremen does not always require reversal of a conviction if the defendant has received an otherwise fair trial.

In the instant case the district court refused to consider the question of whether this particular error could be considered harmless for two reasons. First, the district court felt that application of a "per se reversible error standard" was necessary for deterrent purposes. Second, any application of the harmless error rule was rejected to protect the integrity of the judicial process.

Granting the instant petition for a writ of certiorari is necessary to correct what amounts to an exceptional legal error.

The record in the instant case contained undisputed facts which have

significance aside from the numbers of blacks who did not serve on the Kings County Grand Jury. Here, there is no assertion of petitioner's factual innocence. Respondent does not claim that he did not brutally murder Marlene Miller. Three separate juries heard the evidence of respondent's guilt and none of them found that Hillery deserved anything less than death for what he had done. Respondent does not claim that the evidence presented to the grand jury was insufficient to bind him over for trial. In fact, the prominent black attorney who represented Hillery at trial admitted that there was no question in his mind that respondent would have been bound over for trial had the indictment been quashed and had he received a preliminary hearing. More importantly, there is no claim here that respondent did not receive a fair trial or that blacks had been systematically excluded

from trial juries in Kings County. Furthermore, there is no claim of continuing discrimination in this case, and any deterrent purpose purportedly served by reversing this judgment is therefore meaningless. To the contrary, there is affirmative evidence which the District Court all but ignored which indicated that remedial measures to correct the exclusion of blacks from the grand jury had already been initiated before Hillery was indicted.

Realistically, the integrity of our judicial system is not threatened by the process Kings County used to select its grant jury more than twenty-five years ago. However, the reversal of three different jury verdicts, each returned after a fair trial, all of which are supported by overwhelming evidence of petitioner's guilt, does little to enhance the integrity of the judicial process.

When the totality of those facts are considered, it become unerroringly clear that the People of the State of California have suffered a substantial injustice with the reversal of respondent's 20-year-old first degree murder conviction without any showing that the exclusion of blacks from the grand jury affected the fairness of respondent's trial and in the absence of any assertion of respondent's innocence.

- - - - - -

II

RESPONDENT FAILED TO EXHAUST HIS AVAILABLE STATE REMEDIES SINCE HE SIGNIFICANTLY CHANGED THE EVIDENTIARY BASIS OF HIS CLAIM FOR RELIEF WITHOUT EVER PRESENTING THIS NEW EVIDENCE TO STATE COURTS

To support his claim of systematic exclusion of blacks from the Kings County grand jury, respondent relied primarily upon evidence which was never presented to any of the state courts which have previously been asked to review his claim for relief. In doing so, respondent violated 28 United States Code section 2254 which expressly requires exhaustion of available state remedies.

In his dissent in this case Circuit Judge Anderson concludes that:

> "Although petitioner's basic claim has remained the same, the evidentiary basis for that claim changed significantly in the present habeas corpus proceeding from that presented to the state courts years ago." (9th Cir. opinion, 5/14/84; attached hereto as Appendix "B.")

In rejecting the state's argument on this issue, the majority ignored a substantial body of relevant and binding precedent.

For example, the case of Zicarelli v. Gray (3rd Cir. 1976) 543 F.2d 466 is directly on point and supports the state's position on this issue. (See also Zicarelli v. Dietz (3rd Cir. 1980) 633 F.2d 312, cert. den. 101 S.Ct. 868.)

In the remarkably similar case of Zicarelli v. Gray, supra, 543 F.2d 466, the court held that:

> "For a court to determine a claim that a defendant has not been tried by a jury reflecting a cross-section of the community where the crime was committed, it must be apprised not only of the legal contention, but also of the demographic data supporting the contention. Zicarelli did not make such a proffer to the trial court, nor did he state to the appellate courts that he was ready to present such information to the trial court if the cause was remanded for such purposes. Indeed, the first clear reference to the demographic data was made in Zicarelli's brief that was filed in the federal court to support his petition for habeas corpus."

The court in Zicarelli v. Gray, supra, went on to dismiss the petitioner's cross-section claim and required the petitioner to exhaust this issue in the state courts. (See Zicarelli v. Dietz, supra, 633 F.2d 312, cert. den., 101 S.Ct. 868.)

This same rule applies in those cases where the habeas petitioner has presented some supporting facts to the state courts but has later asserted different and more compelling factual allegations to the federal courts. (See, e.g., Gurule v. Turner (10th Cir. 1972) 461 F.2d 1083, 1084.)

A rule requiring exhaustion has been endorsed by the Fifth Circuit Court of Appeals in Knoxson v. Estelle (5th Cir. 1978) 574 F.2d 1339. In Knoxson a state prisoner was denied habeas relief by the district

court. After oral argument and submission of the case to the district court, petitioner filed a post-submission brief which contained factual material which had never been presented to the state courts.

The Circuit Court of Appeals held that:

> "The post-submission brief does contain new factual allegations in support of Knoxson's legal plea. With regard to these new facts, we believe that the petitioner has failed to exhaust his state remedies. His petition must be dismissed from the federal court without prejudice to give the state court an opportunity to review these newly surfaced facts in the further proceedings that we expect Knoxson to pursue. See Picard v. Connor, 1971, 404 U.S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438; United States ex rel. Boodie v. Herold, 2 Cir. 1965, 349 F.2d 372; Gurule v. Turner, 10 Cir. 1972, 349 F.2d 372; Gurule v. Turner, 10 Cir. 1972, 461 F.2d 1083; Developments in the Law--Habeas Corpus, 73 Harv.L.Rev. 1038, 1069 (1970) ('. . . evidence . . . clearly crucial to the claim . . . should first be presented to the state if the exhaustion rule is to be an effective one')."

> "This Court believes that the interests of the state of Texas, the federal courts, and the petitioner are best balanced by allowing the state courts to consider this evidence. We therefore vacate the District Court's denial of habeas relief and remand to the District Court with directions to dismiss the suit without prejudice to Knoxson's right to refile the petition if he is dissatisfied with the outcome of any proceedings he brings in the state court." (Emphasis added; see also Paullett v. Howard (3rd Cir. 1980) 634 F.2d 117.

More importantly, the majority opinion in the instant case appears to be in direct conflict with earlier precedent decided by 9th Circuit itself.

Thus, in Daniels v. Nelson (9th Cir. 1972) 453 F.2d 340, 342, this Court held that:

> "Thus the claim made before the California court and the claim now made can both be said to be that the confession was involuntary. However, the substance of the claim now made is quite different from the substance of the claim made before the California court. As we stated in

Schiers: '[i]t is now wholly transformed by other factual assertions of the petitioner into quite a different problem.' To sustain the present claim, Daniels would have to offer evidence that does not appear in the record made in the state courts, that is, evidence that the police officer promised to release his family if he confessed. Under these circumstances, we agree with the trial court that the question now presented as to the voluntariness of Daniels' confession should be first presented to the California Courts." (See also Schiers v. People of the State of California (9th Cir. 1964) 333 F.2d 173, 175-176.)

In the instant case, respondent argued that "throughout the entire proceedings in state and federal court, petitioner has alleged systematic exclusion of blacks in the grand jury process in Kings County." (CR 37, p.5.)

The State does not dispute this assertion. The problem with respondent's analysis is that it is far too shallow. While respondent's basic claim has remained

the same, the evidentiary basis of that claim changed dramatically after it was filed in the federal court.

Instead of relying on the evidence introduced in the state court almost twenty years ago, respondent now relies upon what he claims is a sophisticated computer analysis of the statistical probability that blacks would not have served on the Kings County Grand Jury had the selection been random.

Respondent was also allowed to introduce census material not introduced at the state court trial as well as introducing the testimony of several purported witnesses who did not testify at the original motion to quash which was conducted more than twenty years ago.

Thus, while respondent's generic claim has remained the same, the species of his claim has been drastically mutated into a wholly different animal.

It is not necessary that there be an entirely new and different legal contention raised to justify sending a case back to the state courts under section 2254(b). It is sufficient if the new factual allegations are simply "more compelling." (Gurule, supra.) Where the new factual material "wholly transforms" the case or "materially changes" it, the matter must be returned to the state courts. Here, the district court erred in denying the state's motion to dismiss the petition without prejudice and the district court's order granting the writ must therefore be reversed.

- - - - - -

CONCLUSION

The majority opinion in this case which affirms the judgment of the District Court is just another step down a dismal and dark road discounting the value of human life. Here, a first degree conviction has been reversed. The conviction has not been reversed because there is any question of Mr. Hillery's innocence. Far from it, the evidence of Hillery's guilt is overwhelming and uncontraverted.

Nor has Hillery's conviction been reversed because he failed to receive a full and fair trial.

Instead, this particularly vicious and particularly heinous murder has been reversed because black persons had supposedly been purposefully excluded from serving on grand juries in Kings County twenty-five years ago.

However, black persons had regularly served on trial juries in Kings County and were in the process of being selected for the grand jury.

Under the compelling facts of this case, fairness and justice to the victim of Hillery's brutality and to her still grieving family must count for something. There must be some balance, some symetry, some harmony within the constitution. No document with such a noble purpose compels such an ignoble result. No document which seeks to protect the highest values of human existence such as life and liberty can be used to set aside Hillery's inhuman act of violence.

It is no consolation to talk of retrials. Even if a retrial is possible, it will only serve to rekindle the grief, suffering and agony of a family who have already suffered too much. A retrial would clothe petitioner in the presumption of

innocence and would only further erode the public's confidence in an already suspect criminal justice system.

This is a case which desperately cries out for a just result and the granting of this petition for a writ of certiorari to achieve such a purpose.

For the foregoing reasons, petitioner requests that a petition for a writ of certiorari be granted and that the judgment of the district court granting petitioner's application for a writ of habeas corpus be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

WILLIAM G. PRAHL
Deputy Attorney General

Attorneys for Petitioner

WGP:gmm
11/19/84
SA79FH0001

APPENDIX A

(FOR PUBLICATION)
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOOKER T. HILLERY, JR.,	)	No. 83-2017
	)	
Petitioner-Appellee,	)	D.C. No.
v.	)	CV S-78-594 LKK
	)	
REGINALD PULLEY, Warden,	)	
	)	ORDER
Respondent-Appellant.	)	
	)	

Appeal from the United States
District Court For the
Eastern District of California

Honorable Lawrence K. Karlton,
District Judge, Presiding

Submitted April 12, 1984

Before: ANDERSON and SCHROEDER, Circuit Judges, and EAST,* District Judge

In this matter, petitioner Booker T. Hillery, Jr., successfully challenged the constitutionality of his 1962 Kings County Superior Court judgment of conviction and sentence for the stabbing murder of a

---

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

fifteen-year-old girl, in violation of California Penal Code section 187, by applying for a writ of habeas corpus in the District Court. The District Court granted the writ upon concluding that petitioner's conviction resulted from a denial of equal protection because black persons had been systematically excluded from selection to the Kings County grand jury for the years preceding his 1962 indictment.

We affirm upon the basis and for the reasons set forth in the excellent and extensive District Court opinion granting the application. Hillery v. Pulley, 563 F.Supp. 1228 (E.D. Cal. 1983). See also Hillery v. Pulley, 533 F.Supp. 1189 (E.D. Cal. 1982) denial of government's motion to dismiss for failure to exhaust); Hillery v. Sumner, 496 F.Supp. 632 (E.D. Cal. 1980) (denial of government's motion to dismiss for prejudicial delay).

The judgment of the United States District Court granting petitioner's application for writ of habeas corpus is AFFIRMED.

The matter is REMANDED to the District Court for issuance of the writ and other appropriate order.

The state may seek to recharge and try petitioner again by the procedure which conforms to constitutional requirements.

DISSENT

HILLERY v. PULLEY - No. 83-2017

J. BLAINE ANDERSON, Circuit Judge, dissenting:

I respectfully dissent from the court's order affirming the district court.

In my view, petitioner has failed to exhaust his state remedies as required by 28 U.S.C. section 2254(b), Picard v. Conner, 404 U.S. 270, 275-76 (1971), and Rose v. Lundy, 455 U.S. 509 (1982). The testimony of an expert "forensic actuary" presenting a new theory of statistical analysis is, in spite of the characterization by petitioner, new evidence that has not been presented to the state courts. This "new method" is new evidence supporting a new theory.

Nor do I agree that the affidavits of three witnesses establishing the competency of black persons to serve as grand jurors are properly characterized as "cumulative." The same may be said of the new census material.

Although petitioner's basic claim has remained the same, the evidentiary basis for that claim changed significantly in the present habeas corpus proceeding from that presented to the state courts years ago.

We should vacate the district court's order with instructions to dismiss the petition without prejudice.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOOKER T. HILLERY, JR.,	)	No. 83-2017
	)	
Petitioner-Appellee,	)	D.C. No.
v.	)	S-78-594 LKK
	)	
REGINALD PULLEY,	)	
	)	ORDER
Respondent-Appellant.	)	
	)	

Before: ANDERSON, SCHROEDER, and EAST, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.